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INSTITUT TEKNOLOGI FEDERAL SDN BHD

v.

IIUM EDUCATION SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
TENGKU BAHARUDDIN SHAH JCA
[CIVIL APPEALS NOS: W-02-69-2005 & W-02-76-2005]

C

2 SEPTEMBER 2007

LAND LAW: *Caveat - Private caveat - Removal - Caveatable interest - Whether must be definite right relating to land and capable of enforcement - Agreement for sale and purchase of land - Payment of*

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earnest deposit thereof - Whether constituting caveatable interest - Balance of convenience - Special circumstances - National Land Code, ss. 323, 327, 329

Federal Institute of Technology ('FIT') in this case had sought to

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sell a piece of land ('the land') to IIUM Education Sdn Bhd ('IIUM') for RM16.5 million. Having agreed to the salient terms thereof, IIUM however failed to execute the sale and purchase agreement on the scheduled or extended date, and that being so FIT forfeited the RM330,000 earnest deposit paid by IIUM and

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sold the land to another purchaser. IIUM wrote a letter objecting to the forfeiture, but that apart, did nothing to enforce its purported rights. Be that as it may, about a year later, IIUM lodged a caveat against the land. In so doing, it was IIUM's stand that the caveat was necessary as it had agreed to purchase

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the land, was able and willing to complete the purchase and had paid an earnest deposit therefor. Before James Foong J, FIT applied for and obtained an order to remove the caveat ('Removal Order'), but that, that order, upon an application by IIUM subsequently, was stayed by an order granted by Abdul Malik Ishak J ('Stay Order'). Dissatisfied, both parties appealed. FIT

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appealed against the Stay Order while IIUM appealed against the Removal Order.

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Held (dismissing appeal against Removal Order; allowing appeal against Stay Order; refusing interim stay pending leave to appeal to Federal Court; ordering removal of caveat and transfer of land to new purchaser)
Per Richard Malanjum JCA (as he then was) delivering the judgment of the court:

(1) A caveator must show that he has a caveatable interest entitled to be protected pending determination of his actual claim. If there is none then the caveat must be removed. However, if there is such an interest – meaning a definite right relating to land and capable of enforcement – he is still required to prove that there are triable issues for the court to determine. Having established the first two prerequisites, the court must further consider where the balance of convenience lies (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor*). It is also essential to note that the purpose of a private caveat is to preserve the *status quo* pending the filing of action by a caveator to enforce his claim to an interest in the property. (paras 20, 22 & 26)

(2) IIUM did not do anything after its last letter to FIT dated 17 December 2003. Such silence could be taken as a strong indicator that it accepted the fate of the earnest deposit. Hence, to state subsequently in Form 19B after a lapse of about a year after the forfeiture of the earnest deposit that some outstanding issues required further negotiation could hardly be described as reasonable and done in good faith premised on a belief that there was a completed sale. Further, from the facts as disclosed in the affidavits and Form 19B, it can only be said that at most there was a negotiation on the sale but no concluded transaction came into existence. But negotiations for a contract, no matter how advanced, cannot amount to a contract. (paras 25 & 26)

(3) By the time the caveat was lodged, FIT had long forfeited the earnest deposit after having given IIUM additional time to complete the transaction and forewarned the latter of the intention to forfeit the earnest deposit. However IIUM did not take any meaningful step apart from writing a letter objecting to the forfeiture and telling FIT that it was about to obtain the finance for the purchase. Hence, whatever arrangement or understanding between the parties would have ceased long before the lodgment of the caveat. Accordingly, we would

A agree with the conclusion of James Foong J that at the time of lodging the caveat IIUM had no caveatable interest in the said land. The position of IIUM was made worse as it did not even commence action as at 31 December 2004 when the application by FIT for the removal of the caveat was heard. B Indeed no action was filed to date in connection with the caveat. (para 26)

(4) The fact that there was payment of earnest deposit and that it should be refundable did not *ipso facto* provide IIUM with a C caveatable interest in the land. (para 28)

(5) It is obvious that the ground relied on by IIUM is insufficient in law to support a caveat. Accordingly, we would again agree with James Foong J that the caveat must be removed without the necessity of considering the other subsequent steps. D (para 30)

(6) There were no special circumstances to justify the maintenance of the Stay Order. Further, since IIUM did not have any caveatable interest in the land, there is no reason for FIT to E be made to wait according to the convenience of IIUM. Sufficient time had been given to IIUM yet it failed to make any effort to complete the transaction. It waited about one year before lodging the caveat and having so delayed failed to act promptly by filing an action in court to prosecute its F alleged enforceable contract cum caveatable interest in the land. This is a classic example of an abuse of process. The balance of convenience therefore tilts in favour of not allowing the Stay Order to continue. (para 34)

G *[Order accordingly]*

Bahasa Malaysia *Translation Of Headnotes*

Institut Teknologi Federal ('FIT') dalam kes ini berhasrat untuk menjual sebidang tanah ('tanah') kepada IIUM Education Sdn Bhd H ('IIUM') pada harga RM16.5 juta. Walaupun bersetuju dengan syarat-syarat penting perjanjian, IIUM gagal menyempurnakan perjanjian jual beli baginya pada tarikh yang dijadualkan mahupun pada tarikh lanjutan, dan berikutnya FIT merampas wang deposit berjumlah RM330,000 yang bayar oleh IIUM dan seterusnya I menjual tanah kepada pembeli lain. IIUM menulis surat membantah perampasan wang deposit, namun, selain dari itu, tidak berbuat apa-apa bagi menegakkan hak-haknya. Apapun, kira-kira setahun

kemudian, IIUM memfailkan kaveat terhadap tanah. Adalah menjadi pendirian IIUM, dalam berbuat demikian, bahawa kaveat adalah perlu kerana ia telah bersetuju untuk membeli tanah, berhasrat dan berupaya untuk menyempurnakan pembelian tersebut dan telah pun membayar wang deposit baginya. Di hadapan James Foong H, FIT memohon dan memperoleh perintah untuk mengeluarkan kaveat ('Perintah Pengeluaran'), tetapi perintah tersebut, atas permohonan yang dibuat oleh IIUM kemudiannya, telah digantung oleh suatu perintah yang diberikan oleh Abdul Malik Ishak H ('Perintah Penggantungan'). Berasa tidak puashati kedua-dua pihak merayu. FIT merayu terhadap Perintah Penggantungan sementara IIUM merayu terhadap Perintah Pengeluaran.

Diputuskan (menolak rayuan terhadap Perintah Pengeluaran; membenarkan rayuan terhadap Perintah Penggantungan; menolak penggantungan interim sementara mendapat kebenaran merayu ke Mahkamah Persekutuan; memerintahkan pengeluaran kaveat dan pindahmilik kepada pembeli baru): Oleh Richard Malanjum HMR (beliau semasa itu) menyampaikan penghakiman mahkamah

(1) Seorang pengkaveat perlu menunjukkan bahawa beliau mempunyai satu kepentingan boleh kaveat yang berhak dilindungi sementara menunggu keputusan tuntutan sebenarnya. Jika kepentingan sedemikian tidak wujud, maka kaveat hendaklah dikeluarkan. Bagaimanapun, jika kepentingan sedemikian wujud – dalam ertikata wujud suatu hak khusus terhadap tanah yang boleh dilaksanakan – beliau masih perlu membuktikan bahawa terdapat isu-isu yang perlu dibicarakan yang harus diputuskan oleh mahkamah. Setelah kedua-dua syarat ini dibuktikan, mahkamah seterusnya hendaklah menimbang dimana letaknya neraca keselesaan (*Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor*). Adalah juga penting untuk dinyatakan bahawa kaveat persendirian adalah bertujuan untuk mengekalkan *status quo* sementara menunggu pemfailan tindakan oleh pengkaveat bagi menuntut kepentingannya di dalam hartanah.

(2) IIUM tidak berbuat apa-apa selepas surat terakhirnya kepada FIT bertarikh 17 Disember 2003. Penyepiannya itu boleh dianggap sebagai petanda bahawa ia menerima nasib yang menimpa wang deposit. Oleh itu, untuk menyatakan kemudiannya di dalam Borang 19B selepas setahun wang

A deposit dirampas bahawa beberapa isu tertunggak masih perlu dirundingi adalah tidak munasabah dan tidak dibuat secara *bona fide* dengan kepercayaan bahawa wujud satu kontrak yang sempurna. Selain itu, dari fakta-fakta yang terserlah dari afidavit-afidavit dan Borang 19B, apa yang boleh dikatakan
B adalah bahawa wujud rundingan mengenai penjualan tetapi tiada transaksi yang sempurna telah dirumuskan. Apapun, rundingan untuk berkontrak, walau sejauh mana sekalipun rundingan tersebut berjalan, tidak boleh menjadi satu kontrak.

C **(3)** Semasa kaveat dimasukkan, FIT telah lama merampas wang deposit setelah memberi IIUM masa tambahan untuk menyempurnakan transaksi dan memberi amaran tentang niatnya untuk merampas wang deposit. IIUM bagaimanapun tidak mengambil sebarang langkah bermakna selain dari menulis
D surat membantah rampasan dan memberitahu FIT bahawa ia sedang mengusahakan pembiayaan bagi pembelian. Oleh itu, apa-apa persefahaman yang ada di antara pihak-pihak telah lama berakhir apabila kaveat difailkan. Dengan demikian, kami bersetuju dengan James Foong H bahawa semasa kaveat
E dimasukkan IIUM tidak mempunyai kepentingan pada tanah yang boleh dikaveatkan. Kedudukan IIUM menjadi lebih buruk memandangkan ia gagal memulakan sebarang tindakan setakat 31 Disember 2004 bilamana permohonan oleh FIT untuk pengeluaran kaveat didengar. Malah tiada sebarang tindakan
F telah difail berhubung dengan kaveat.

(4) Fakta bahawa terdapat bayaran wang deposit dan bahawa ianya boleh dikembalikan *ipso facto* tidak memberikan IIUM satu kepentingan boleh dikaveat di dalam tanah.

G **(5)** Jelas bahawa alasan yang menjadi pergantungan IIUM adalah tidak mencukupi di sisi undang-undang untuk menampung suatu kaveat. Oleh yang demikian, kami sekali lagi bersetuju dengan James Foong H bahawa kaveat hendaklah dikeluarkan tanpa perlu menimbang langkah-langkah yang selanjutnya.

H **(6)** Tidak terdapat sebarang halkeadaan istimewa bagi menjustifikasikan pengekalan Perintah Penggantungan. Selanjutnya, oleh kerana IIUM tidak mempunyai sebarang kepentingan boleh dikaveat di dalam tanah, tiada alasan untuk menuntut FIT untuk terus
I menunggu mengikut kesesuaian IIUM. Masa yang mencukupi telah diberikan kepada IIUM, namun ia gagal mengambil apa-apa langkah bagi menyempurnakan transaksi. Ia menunggu lebih

kurang setahun sebelum memasukkan kaveat, dan setelah berlengah sebegitu, terus gagal untuk segera bertindak memfailkan tindakan di mahkamah bagi mendakwa kontrak yang dikatakannya boleh dikuatkuasakan itu serta kepentingan boleh dikaveat yang dituntutnya. Ini suatu contoh klasik salah guna proses. Oleh itu, imbangan keselesaan adalah berpihak kepada tidak membenarkan Perintah Penggantungan untuk terus kekal.

[Perintah sekadarnya.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***

Hing Kim Pong v. Teo Eng Jin [1980] 1 MLJ 43 ***(refd)***

Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 CA ***(refd)***

Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***

Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***

Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 323(1), 327, 329

Other sources referred to:

Judith Sihombing, *National Land Code, A Commentary*, 2nd edn, p. 743

(Civil Appeal No: W-02-69-2005)

For the appellant - Bharti Seth (Sumathi Krishnan with him); M/s Bharti Seth & Assocs

For the respondent - Watson Peters (Amerjit Singh with him); M/s Watson Peters & Mohd Fuad

(Civil Appeal No: W-02-76-2005)

For the appellant - Watson Peters (Amerjit Singh with him); M/s Watson Peters & Mohd Fuad

A *For the respondent - Bharti Seth (Sumathi Krishnan with him); M/s Bharti Seth & Assocs*

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S6-24-2682-2004]

B *Reported by WA Sharif*

JUDGMENT

Richard Malanjum JCA:

C

[1] There are two appeals before us. One appeal (W-02-76-2005) (the appeal proper) is by IIUM Education Sdn. Bhd. (IIUM) against the Order made by James Foong Cheng Yuen J (as he then was) (the first learned High Court Judge) of the
D Kuala Lumpur High Court given on 31 Disember 2004 (the Removal Order) allowing the application by FIT Teknologi Federal Sdn. Bhd. (FIT) to remove the caveat lodged by IIUM on a parcel of land measuring approximately 4 acres held under Title No. H.S. (D) No. 83192, Lot No. 12734, situated in the Mukim
E and District of Kuala Lumpur, Wilayah Kuala Lumpur (the said land). The other appeal (W-02-69-2005) (the stay appeal) is by the FIT against the granting of stay of the Removal Order (the Stay Order) given by Abdul Malik Ishak J (as he then was) (the second learned High Court Judge) of the Kuala Lumpur High
F Court on 17 January 2005.

[2] When the stay appeal came up for hearing on 27 January 2005 this court suggested and the parties agreed that the appeal proper should be heard first and to be followed by the stay appeal. Hence we proceeded to hear the appeals in that sequence.

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[3] After hearing the parties in the appeal proper we dismissed the appeal with costs and affirmed all the orders given by the first learned High Court Judge. In respect of the stay appeal we also heard the parties and at the conclusion of the arguments we
H allowed the appeal with costs here and below. We also refused stay pending application for leave to the Federal Court. Further, we ordered that the caveat lodged was to be removed forthwith and direct the registrar of titles to register the instrument of transfer in respect of the said land.

I

[4] Briefly the facts are as follows. FIT was running a college called the Federal Institute of Technology providing engineering courses. As it did not wish to continue as a college FIT being the registered owner of the said land was keen to sell it to any interested purchaser. Thus in May 2003 IIUM approached FIT with a view to purchase the said land. Negotiation between the parties commenced with the salient terms agreed upon during a meeting held on 13 June 2003 but subject to a sale agreement being executed. Some of the terms agreed were that the total price would be RM16,500,000, that non-refundable earnest deposit of RM330,000 equivalent to 2% of the purchase price was to be fully paid by the end of June 2003, that 8% of the purchase price would be payable on the execution of the sale agreement which must be signed by 28 June 2003. It was also an agreed term that the earnest deposit would be forfeited in the event IIUM failed to sign the sale agreement by 28 June 2003.

[5] However the due dates as agreed upon were not strictly complied with. Instead there were exchanges of correspondences between the solicitors acting for the respective parties. The earnest deposit was only paid on 3 September 2003.

[6] Subsequently on 9 September 2003 a draft of the sale agreement was sent by the solicitors of FIT to the solicitors of IIUM with request for comments on the draft. Unfortunately despite several reminders the solicitors for IIUM could only reply vide their letters dated 7 October 2003 and 6 November 2003 indicating that they were still waiting for a reply from IIUM. Further correspondences between the solicitors of the parties indicated that IIUM sought for an extension of time to 31 January 2004 in paying for the balance of the purchase price. FIT by its letter dated 27 October 2003 did not agree to the request for extension of time and insisted that the sale agreement must be signed by 31 October 2003 failing which the 2% earnest deposit would be forfeited.

[7] By a letter dated 27 November 2003 the solicitors of FIT wrote to the solicitors of IIUM informing on the forfeiture of the earnest deposit due to the failure of IIUM to sign the sale agreement. In a letter dated 17 Disember 2003 IIUM wrote directly to FIT stating that the earnest deposit should not be forfeited and that it was in the process of getting the finance for the purchase price which should be completed by mid January 2004.

[8] However since that letter of 17 December 2003 there was no further development or any step taken by IIUM.

[9] Hence, the said land was offered for sale and in early July 2004 FIT received an offer from Macro System Consultancy (MSC) to buy the said land for RM19,970,000. On 22 July 2004 a sale and purchase agreement was entered into between FIT and MSC. Under the agreement the extended period for completion was stipulated to be 31 December 2004. There was indeed an urgency to settle the transaction.

[10] Thus to pay for the balance of the purchase price MSC applied and obtained approval for a loan facility amounting to RM17,000,000 from Bumiputra-Commerce Bank (BCBB). Payments were also made by MSC for the full duty on both Form 14A and the loan documentations amounting to RM583,000 and RM85,000 respectively plus other legal costs incurred.

[11] To complete the sale the solicitors for BCBB went on to present all the relevant documents at the Land Office on 1 Disember 2004. However the presentation could not take effect as IIUM had lodged a caveat on the said land on 24 November 2004 via presentation No. 16005/2004 (the caveat).

[12] In Form 19B together with the accompanying statutory declaration required for the lodgment of the caveat the reasons given by IIUM were, *inter alia*, that it had agreed to purchase the said land for RM16,500,000 with earnest deposit paid amounting to RM330,000, that during the negotiation on the terms of sale to be incorporated in a sale and purchase agreement to be executed there were some issues which could not be agreed upon by the parties, that pending the settlement of those issues entry of a caveat was necessary and that IIUM was still prepared, willing and able to purchase the said land.

[13] Failure by FIT to deliver the said land free from any encumbrances by 31 Disember 2004 would be deemed to be a default act thereby entitling MSC to claim for damages including exemplary damages against FIT.

[14] An application under ss. 327 and 329 of the Code was therefore made to the court by FIT for an order to have the caveat removed. It was heard by the first learned High Court Judge who granted the removal order basically on the ground that IIUM had no caveatable interest on the said land. But the stay

order was subsequently given by the second learned High Court Judge. Hence appeals were lodged to this court against the respective Orders.

The Appeal Proper: Appeal Against The Removal Order

[15] Before us learned counsel for IIUM submitted that the application to remove the caveat should have been dismissed in limine as no cause of action was disclosed. He went on to say that there was a specifically enforceable agreement concluded since FIT agreed to sell the said land to IIUM and earnest deposit was paid. Learned counsel further argued that except for one issue all the other principal terms had been agreed upon. He submitted that there were triable issues and the balance of convenience warranted for the caveat to be retained.

[16] For FIT it was submitted that IIUM had no caveatable interest to maintain the caveat since there was no concluded sale agreement and that the earnest deposit had been forfeited due to the failure of IIUM to execute a sale agreement within the extended period given by FIT or to make any payment for the balance of the agreed purchase price.

[17] Now, s. 323(1) of the National Land Code 1965 (the Code) which deals with private caveat provides, *inter alia,*

> (1) The person or bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest'....

[18] In her book *National Land Code: A Commentary* [2nd edn] at p. 743 author Judith Sihombing opined that a 'private caveat procedure is designed to protect a registrable interest or a right to such interest' and that 'the only parties able to caveat are those who may effect dealings with land or interests with land under the Code. She went on to state that the words 'title ... in alienated land' refer to the statutory or legal estate and illustrate that the claimant expects to become the proprietor of the land on completion of the transaction behind the caveated claim; and 'registrable interest in ... alienated land' refer to the obtaining of a registered interest, for example a lease or a charge, which the caveator, expects to hold on completion of the transaction behind the caveated claim. This interest must be one which is recognized

by the Code as capable of being registered to produce a statutory interest. As to the scope of registrable interest the learned author wrote that it is one 'which gives its holder an immediate right to have a substantive entry made on the register, ie, registration; for example the purchaser of land, who has paid all purchase money, received a transfer in registrable form, and the issue document of title is registrable.'

[19] Section 327(1) of the Code provides for an aggrieved person or body to apply to the court for the removal of a private caveat. It reads:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court ... may make such order on the application as it may think just.

[20] Although the aforementioned section does not stipulate any guideline on how to approach such an application this court in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 succinctly laid down a three-stage test which must be considered when evaluating whether a caveat ought to be removed or allowed to remain on land. The three-stage test was expressed in these terms:

> The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then cadit quaestio, and the caveat must be removed without the necessity of going any further
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> ...
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> The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case to case.
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> ...
>
> The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* [[1979] 2 MLJ 212] as 'the balance of convenience'. As to the matters that go to determine in which

direction the balance should tilt, these have already been set out in such clear terms by Lord Diplock in *Eng Mee Yong* that mere repetition becomes unnecessary.

[21] In summary therefore the first critical issue is for a caveator to show the court that he has caveatable interest entitled to be protected pending determination of his actual claim. If there is none then the caveat must be removed. If there is such interest the caveator is still required to prove that there are triable issues for the court to determine. Having established the first two prerequisites the final hurdle is for the court to consider where the balance of convenience lies.

[22] It is also essential to understand that the purpose of a private caveat is to preserve the *status quo* pending the filing of action by a caveator to enforce his claim to an interest in the land. (See: *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44). Hence, it is trite law that a caveator must therefore pursue his claim promptly in a court of law failing which his caveat would be defeated as against the inalienable rights of the registered owner to enjoy his land. (See: *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377; *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909).

[23] Incidentally, it 'is axiomatic that negotiations for a contract, however advanced, do not amount to a contract .... Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A *fortiori*, he has no interest that is capable of protection by the entry of a caveat' per Gopal Sri Ram JCA in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 CLJ 545 CA. (See also: *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 SC).

[24] Now, in the present appeal the contents of Form 19B indicate that the agreed purchase price was RM16,500,000 with the earnest deposit paid amounting to RM330,000 on 3 September 2003. Although it was earlier agreed that within 14 days after the payment of the earnest deposit the sale agreement should be signed it did not happen. Instead IIUM sought for a longer period. FIT in its letter dated 27 October 2003 stated that it could only agree until 31 October 2003 after which the earnest deposit would be forfeited. IIUM failed to meet the due date. All it did was to write to FIT directly vide its last letter dated 17 Disember 2003 stating that the earnest deposit

should not be forfeited and to disclose that it was about to get the finance for the purchase. Again nothing transpired after the last letter of IIUM to FIT.

[25] It was only when an attempt to lodge the instrument in relation to the transaction with MSC that the caveat was discovered to have been lodged on 24 November 2004. Obviously IIUM did not do anything after its last letter to FIT. Such silence could be taken as a strong indicator that IIUM accepted the fate of the earnest deposit. Subsequently to state in Form 19B after a lapse of about a year after the forfeiture of the earnest deposit that some outstanding issues required further negotiation could hardly be described as reasonable and done in good faith premised on a belief that there was a completed sale.

[26] From the facts as disclosed in the affidavits filed and Form 19B we would say that at most there was a negotiation on the sale but no concluded transaction came into existence. Negotiations for a contract, no matter how advanced, cannot amount to a contract. The position of the parties in this appeal thus comes within the view expressed by this court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 His Lordship Gopal Sri Ram JCA delivering judgment for the court said this at p. 633:

> Meaning no disrespect to counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondences exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

(See also: *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679 CA).

[27] By the time the caveat was lodged FIT had long forfeited the earnest deposit after having given IIUM additional time to complete the transaction. Attempt by IIUM to seek for more time was refused. IIUM was also forewarned by FIT of its intention to forfeit the earnest deposit in the event that the transaction was not completed by the due date. However IIUM did not take any meaningful step except to write a letter to FIT saying that there should be no forfeiture and that it was about to get the finance for the purchase. Further IIUM never asserted that it was willing

and able to pay or had tendered to FIT the balance of the purchase price. Hence, whatever arrangement or understanding that might have been made between the parties would have ceased long before the lodgment of the caveat. Accordingly we agree with the conclusion of the learned first High Court Judge that at the time of lodging the caveat IIUM had no caveatable interest in the said land. It is settled that caveatable interest must be a definite right relating to land and capable of enforcement and a caveator must be in a position to institute a suit for specific performance of claim. The position of IIUM was made worse as it did not even commence action as at 31 Disember 2004 when the application by FIT for the removal of the caveat was heard. Indeed it was not rebutted that no action was filed to date in connection with the caveat.

[28] The fact that there was payment of earnest deposit and that it should be refundable did not *ipso facto* provide to IIUM caveatable interest in the said land. Mere pecuniary interest in land does not entitle a person to lodge a caveat under s. 323 of the National Land Code. (See: *Registrar of Titles, Johore v Temenggong Securities Ltd [supra]*.

[29] In view of our foregoing determination it is obvious that the ground relied on by IIUM is insufficient in law to support a caveat. Accordingly we agree with the learned first High Court Judge that the caveat must be removed without the necessity of considering the other subsequent steps as propounded in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor (supra)*.

[30] We therefore dismissed the appeal against the grant of the removal order with costs and affirmed all the orders given by the learned first High Court Judge.

The Appeal Against The Stay Order

[31] Learned counsel for FIT submitted that since the learned first High Court Judge found there was no caveatable interest and ordered that the caveat should be removed the issue of stay should not arise. She cited the case of *Hing Kim Pong v. Teo Eng Jin* [1980] 1 MLJ 43.

[32] Learned counsel for IIUM argued that the stay order should be maintained due to the existence of special circumstances. He submitted that without the stay order the said land would be transferred to a third party and thus irrecoverable.

[33] Having heard the respective submissions of counsel for the parties we were not convinced that there were special circumstances to justify the maintenance of the stay order. In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausha Makmur Bhd* [2003] 4 CLJ 1 the Federal Court expressed a view on what constituted 'special circumstances' thus at p. 16:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related.

[34] The point raised as special circumstance is in our view insufficient. We are in agreement with the first learned High Court Judge that IIUM did not have any caveatable interest in the said land. There is therefore no reason for FIT to be made to wait according to the convenience of IIUM. Sufficient time had been given to it yet it failed to show any effort made to complete the transaction. For instance it waited for about one year before lodging the caveat. Then having lodged the caveat in such delayed time it has now failed to act promptly by filing an action in court to prosecute its alleged enforceable contract cum caveatable interest in the said land. In our view it is a classic example of an abuse of process. The balance of convenience therefore tilts in favour of not allowing the stay order to continue. In fact it is unreasonable on the part of IIUM to insist for a stay of the removal order when it has nothing in the said land to be safeguarded.

[35] For the foregoing reasons we allowed the appeal against the granting of the stay order with costs here and below. We also declined to give interim stay pending leave to appeal to the Federal Court. We ordered as well that the caveat be removed and that the Registrar of Titles to forthwith register the documents for transfer in respect of the said land.